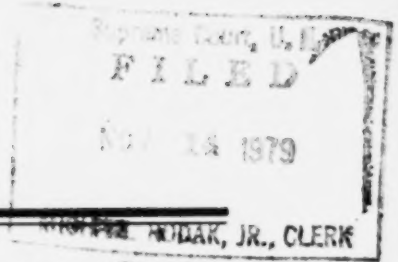


No. 79-436



---

**In the Supreme Court of the United States**

OCTOBER TERM, 1979

---

STANLEY HARAPAT, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF  
HEALTH, EDUCATION, AND WELFARE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

WADE H. MCCREE, JR.  
*Solicitor General  
Department of Justice  
Washington, D.C. 20530*

---

**In the Supreme Court of the United States**

**OCTOBER TERM, 1979**

---

**No. 79-436**

**STANLEY HARAPAT, PETITIONER**

**v.**

**PATRICIA R. HARRIS, SECRETARY OF  
HEALTH, EDUCATION, AND WELFARE**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT**

---

**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

Petitioner contends that the court of appeals erred in holding that the district court lacked jurisdiction to review the denial of his seventh application for Social Security disability benefits on the ground of administrative *res judicata*. For the reasons fully explained by the court of appeals (Pet. App. A-1 to A-6), that decision is correct.

1. Petitioner was last employed in the early 1950's (Pet. 3) and last met the earnings requirement under the Social Security Act, 42 U.S.C. 401 *et seq.*, on March 31, 1953 (Pet. App. A-1). Thus, petitioner's claim involves his physical and mental condition more than 25 years ago. Petitioner's first application for disability benefits was filed in 1962 (Pet. App. A-1). It was denied initially, on reconsideration, and after a hearing by an administrative

law judge in 1963 (*ibid.*). Petitioner did not appeal to the Appeals Council or seek judicial review. Instead, he filed five more applications for the same period of disability over the next nine years (*ibid.*). Each was denied; in none did petitioner exhaust his administrative remedies or seek judicial review (Pet. 3).

Petitioner, with the assistance of counsel, filed his seventh application for benefits in 1974 (Pet. 3-4). This claim was denied initially and on reconsideration, and a hearing was denied on the ground that it was barred by a prior final decision of the Secretary under the principle of administrative *res judicata*. 20 C.F.R. 404.937(a). The Appeals Council affirmed (Pet. 4). Petitioner then sought judicial review pursuant to Section 205(g) of the Act, 42 U.S.C. 405(g). Based on a magistrate's recommendation, the district court rejected the government's claim of *res judicata* and remanded to the Secretary for a hearing on the merits of petitioner's application (Pet. A-43 to A-53).

On remand, the administrative law judge conducted a hearing and issued a recommended decision, concluding that petitioner was not disabled at the pertinent time. The judge added that he still considered petitioner's claim to be barred by *res judicata* (Pet. A-21 to A-42). The Appeals Council affirmed (*id.* at A-18 to A-20) and petitioner again sought judicial review. Based on a magistrate's recommendation, the district court entered judgment for petitioner on the ground that the Secretary's decision was not supported by substantial evidence (*id.* at A-10 to A-17).

The Secretary appealed, contending that the administrative decision was supported by substantial evidence. The Secretary also claimed that the district court had erred in initially accepting jurisdiction over the case because the original administrative denial of

petitioner's seventh application for benefits was not a "final decision of the Secretary made after a hearing" and was thus not subject to judicial review under 42 U.S.C. 405(g) and (h).<sup>1</sup> The court of appeals agreed, holding that the Secretary's denial of petitioner's application without a hearing on the basis of *res judicata* (see 20 C.F.R. 404.937) and the Secretary's refusal to reopen petitioner's first application (see 20 C.F.R. 404.957) are not subject to judicial review in light of *Califano v. Sanders*, 430 U.S. 99 (1977).

2. The court of appeals correctly held that *Califano v. Sanders*, *supra*, forecloses judicial review of petitioner's claim. In that case, the Court held that 42 U.S.C. 405(g) does not confer jurisdiction on the district courts to review a final decision of the Secretary not to reopen a previously adjudicated claim for benefits, because it is not a decision made after a hearing. 430 U.S. at 107-108. The principle established there is equally applicable to the Secretary's initial refusal to grant a hearing on petitioner's seventh application for benefits based on *res judicata* under 20 C.F.R. 404.937(a). This was not a decision made after a hearing, and Congress has thus precluded judicial review.

The Tenth Circuit has also held that dismissal of claims by the Secretary on *res judicata* grounds are not reviewable under 42 U.S.C. 405(g) and (h). *Neighbors v. Secretary of Health, Education and Welfare*, 511 F. 2d 80

<sup>1</sup>Although the Secretary did not appeal the district court's initial remand order, the court of appeals correctly held (Pet. App. A-6) that she was free to raise the jurisdictional issue after the district court's decision on the merits following the remand, since jurisdictional issues may be raised at any time. See Fed. R. Civ. P. 12(h)(3). Petitioner does not dispute this holding.

(10th Cir. 1974), cited with approval in *Califano v. Sanders, supra*, 430 U.S. at 107-108 n.8. Petitioner does not discuss *Sanders* or *Neighbors*, and, indeed, cites no authority in support of his contention (see Pet. 4-5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

NOVEMBER 1979